IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 905, 906 & 907 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

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RUPALIBEN JAYANTKUMAR PATEL

Versus

HIMMATLAL JAMNADAS MANIAR

Appearance:

1. Civil Revision Application No. 905 of 2002

MR NV SOLANKI for Petitioner No. 1

..... for Respondent No. 1-4,6-17

MR SHITAL R PATEL for Respondent No. 5

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 23/07/2002

ORAL (COMMON) JUDGEMENT

These three revision applications have been filed by the petitioners-original plaintiffs in three different Civil Suits being Special Civil Suits No. 456, 457 and

458 of 2002 pending before Learned Civil Judge (SD), Surat. The plaintiff initiated the aforesaid Civil Suits against the respondents and there an interim relief stands operative, preventing respondents no.1 to 4 from transferring the suit property. However, there is no injunction operating preventing the respondents from raising any construction in the property in question. However, the respondents have not claimed equity. Therefore, whatever construction is raised in the disputed property, the said construction would naturally be subject to the ultimate decision in the suit. During the pendency of the said suits, the petitioners had submitted an application under Order 26 Rule 9 of the Code of Civil Procedure, for appointment of a Commissioner to draw a proceeding about the existing situation on the spot. After hearing the parties, the learned trial Judge has rejected the said application. Hence these revision applications.

2. In these revisions, it has been contended that the trial court has not considered the pros and cons touching the merits of the rival case and simply narrated the cases of the rival parties and that shows that there is no application of mind. However, by narrating the cases of the rival parties, the learned Judge has made some observations indicating that he had applied his mind to the arguments advanced before him. So far as the appointment of Commissioner is concerned, it is a discretionary order to be passed by the Court. In the present case, we find that the respondents are not prevented by ad-interim prohibitory order from raising construction. At the same time, it has also been made clear undisputedly that the respondents have agreed that they will not claim any equity if ultimately the petitioner succeeds in the suit. In above view of the matter, the construction at disputed place is not a subject matter of dispute since there is no interlocutory order preventing the respondents from raising construction at the said spot. Moreover, the petitioner cannot be permitted to bring evidence through the agency of the Court to show the existing position as on the date of the Rojkam and as on the date on which the decree may be passed. Whatever may be the construction, it will be subject to the ultimate decision of the suit. Therefore, the said construction will not be the subject matter in the suit. In that view of the matter, the petitioners cannot be permitted to bring evidence on record through the agency of the court as to the existing situation of the spot. In that view of the matter, it cannot be said that injustice is caused to the petitioner when the Commissioners have not been appointed by the trial court.

There is no failure of justice also. Moreover, it cannot be said that the trial court has not exercised jurisdiction, vested in it, legally. In that view of the matter, the order in question cannot be treated to be illegal.

3. Learned Advocate for the petitioner has relied upon three decisions - (1) AIR 1996 Katnataka 348 (Michael Mascarenhas v. John Mascarenhas), (2) 1998 AIHC 168 (Sydu Srinivasa Rao v. Sydu Narayana Swamy), (3) AIR 1986 Madras 33 (Ponnusamy Pandaram v. Salem Vaiyappamalai Jangamar Sangam). There the matter related to the expression case was decided. We do not dispute here as to what is "case decided". However, the emphasis is that there is no failure of justice. Even if we take the request to appoint the Commissioner is treated to be a case decided, then also when the appointment of Commissioner cannot be made for bringing some evidence on record through the agency of court, the order refusing to appoint the Commissioner cannot be treated to be illegal on the face of it.

4. Moreover, the petitioner can lead evidence by examining the witnesses of neighbourhood and by bringing documentary evidence from the concerned local authority from which the respondents may have obtained permission to raise construction at the place in question. This would show as to the extent of construction made by the respondents at the place in question. Therefore, it cannot be said that the appointment of Commissioner is the only mode of proving the fact on record. Even from this angle, the order in question cannot be treated to be illegal and, therefore, there is no reason to interfere with the said order in this revisional jurisdiction. Therefore, apart from the applicability of the amended provisions of section 115 of the Code of Civil Procedure which has been amended w.e.f. 1.7.2002, the order in question do not require interference by this Court. Therefore, this revision application requires to be dismissed. This revision application is ordered to be dismissed accordingly. No order as to costs.

23.7.2002 [D P Buch, J.]
msp